IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Civil writ petition No. 230 of 2003.

Date of decision: 3. 01. 2006.

State of H.P. and others. Petitioners.

Versus

Presiding Judge and another. Respondents.

Coram:

The Hon'ble Mr. Justice K C Sood, J.

Whether approved for reporting **?**[1]

For the Petitioners: **Mr. Ashok Chaudhary, Additional Advocate General.**

For the Respondent No.2:Mr. K.D. Sood, Advocate.

K C Sood, J. (oral)

This petition under Articles 226/227 of the Constitution of India is directed against the award made by the Presiding Judge, H.P. Labour Court, Shimla on October 10, 2002 in Reference No.12 of 1998.

The claim of the respondent No.2, herein after referred to as the "workman", before the Labour Court was that she was engaged as un-skilled Mazdoor on daily wages with effect from March 1, 1988. She worked for about two years in the Office of the Superintending Engineer, Irrigation and Public Health Department, though as Steno-typist, but then she was transferred to the office of the Executive Engineer at Una where she worked in the same capacity till May 31, 1990 when her services were illegally terminated along with some other similarly situate workmen. According to the workman, the termination was challenged before

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[1] ***Whether reporters of Local Papers may be allowed to see the judgment?***

the Himachal Pradesh State Administrative Tribunal and she was reinstated, by interim orders, in service. She joined back her duties on September 3, 1990. The proceedings were finally disposed of by the Tribunal on July 31, 1995 giving her benefit of continuity in service.

The grievance of the petitioner is that on July 1, 1993, she fell ill due to "*depression of family circumstances*" as a result of which she remained under treatment with Bagga Clinic, Phagwara (Punjab) from July 1, 1993 to October 21, 1995 and reported for duty to the Assistant Engineer, Irrigation and Public Health Department, Division No.2 Una on October 25, 1995 along with medical fitness certificate. She was not allowed to join duties and was orally informed that her services stood terminated and she cannot be taken back without prior approval of the higher authorities. She kept on visiting the office but was not taken back in service. In these circumstances, she served a demand notice on July 16, 1996. Conciliation proceedings failed which resulted in the reference to the Labour Court.

It is the case of the petitioner that though she had put in more than 240 days of service during the preceding year of her illness, yet her services were terminated without any notice, charge-sheet or inquiry. She was not paid any retrenchment compensation though persons junior to her were retained in service. It is her case that the termination of her services violates Section 25-F and 25-G of the Industrial Disputes Act, 1947 ("Act" for short). The petitioner claim reinstatement in service with all consequential service benefits including back wages.

The case of the present petitioner (Department for short) before the Labour Court was that the petitioner was engaged as daily waged Beldar in the Department with effect from March 1,

1988. She worked as such till May, 1990 and she was dis-engaged with effect from June 1, 1990 due to non-availability of work but the petitioner filed an application before the H.P. State Administrative Tribunal and pursuant to the interim orders of the Tribunal, she was re-engaged with effect from September 3, 1990. She worked with the Department till June 30, 1993. On that date, she left the job voluntarily, without information to any official and despite two notices dated August 2, 1993 and August 17, 1993, she did not either joined the service or informed the Department about the cause of her absence. It is denied that she ever worked as Steno-typist during the period in question. It is stated that when the petitioner reported to the Department, the matter was referred to the Engineer-in-Chief, Irrigation and Public Health Department who advised that in the facts and circumstances of the case, the petitioner was not entitled to resume back the duties. It is the case of the Department that the workman left the job voluntarily and did not report for duty or otherwise informed about her illness inspite of two reminders and in these circumstances, there was no question of she having been issued a notice under Section 25-F or payment of any compensation to her.

Learned Labour Court took the view that the petitioner was terminated from services illegally and answered the reference in affirmative. The Labour Court held that the petitioner was entitled to re-instatement with continuity in service and seniority with effect from the date of her retrenchment, i.e, July 1, 1993,.

Dis-satisfied, the Department is in this petition.

The question which calls for answer in this petition is *whether the absence of the respondent No.2 from July 1, 1993 to October 25, 1995 can be over-looked and it can be said that the workman was retrenched in violation to Section 25-F of the Act.*

Section 25-F of the Act lays down that no workman employed in any industry who has been in continuous service for not less than one year under an employer would be retrenched by that employer until:

> (a)(i) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or
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> ii) Workman has been paid in lieu of such notice, wages for the period of the notice;
>
> (b) Workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every month of every completed year of continuous service or any part thereof in excess of six months and
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> (c) Notice in prescribed manner is served on the appropriate Government or such Authority as may be specified by the appropriate Government by notification in the Official Gazette.

The action of the petitioner-employer in not accepting the workman back in the job after more than two years, without intimation to the Department, inspite of two notices of Department calling her to join back the duties, amounts to retrenchment within the meaning of Section 2 (oo) of the Act.

Section 1 (oo) of the Act reads:

> "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a

punishment inflicted by way of disciplinary action but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health".

The definition of "*retrenchment"* under Section 2 (oo) of the Act is wide and unhampered by any restriction. By the expression, "termination for any reason whatsoever". The definition read with clause (a) and (b) expressly excludes voluntary retirement of a workman or retrenchment of the workman on reaching the age of superannuation or termination on the ground of continued ill health and therefore, voluntary retirement of a workman cannot be said to be "termination" by the employer of a workman. The legislature has taken care to say that "voluntary retirement" would not amount to "termination by the employer of the services of a workman for any reason whatsoever".

The expression 'termination' by the employer, of the services of a workman, for any reason whatsoever are understood to mean, it is well settled, every conceivable termination of a

service of a workman by an act of employer but does not include voluntary retirement on the part of the workman.

The Constitution Bench of the Supreme Court in *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh (1990) 3 SCC 682* considered the scope of word 'retrenchment' as defined in Section 2 (oo) and held in para 17 at page 716 of the judgment::

> "*Analysing the definition of retrenchment in Section2 (oo) we find that termination by the employer of the services of a workman would not otherwise have covered the cases excluded in clauses (a) and (b) namely, voluntary retirement and retirement on reaching the stipulated age of retirement or on the grounds of continued ill health. There would be no violation element of the employer. Their express exclusion implies that those would otherwise have been included".*

Thus, if an employee voluntary retires from the employment or in other words, abandons the job, then such retirement or abandonment would not constitute retrenchment within the meaning of Section 2 (oo) and in turn for the purpose of Section 25-F of the 'Act'. Reason is not far to seek.

This apart the expression '*for any reason whatsoever'*, plainly means that 'retrenchment' include every termination of a service of a workman provided such termination is the result of any action or act of the employer. In the present case, admittedly, the petitioner did not report for duty for more than two years inspite of two notices to her in terms of Annexures P2 and P3 dated August 2, 1993 and August 17, 1993. These communications to the

respondent No.2 were sent at her home address as given by her, in village Easpur District Una, H.P. to which address the respondent No.2 admittedly belongs. She was informed by these notices that she had worked up to June 30, 1993 on Water Lift Tap No.64 under Muster Roll No. 365 and her wages for the month of June 1993 amounting to rupees 660/- are still with the office and she has not collected the same and left the job without information. Inspite of absence of one full month of July she had not either reported for duty or collected the wages and has abstained herself without information to the Office or disclosing reason for her absence. She was advised to inform the address on which her wages could be sent through money order and if she fails to present herself for work within fifteen days of the notice or no proper reply is received, then it will be presumed that she had left the work. To a similar effect is letter Annexure P-III addressed to the workman by the Executive Engineer dated August 17, 1993 inviting her attention to the earlier notice of August 2, 1993 . She was again informed that she should receive her wages for the month of June, 1993 from the concerned Sub Division and inform in writing about her having abandoned the work. Admittedly, no reply was received from the workman nor she sent any reply.

According to the workman, she never received these two communications for the reason that she was living at Phagwara for her treatment at Bagga Clinic. I have seen the photo copy of the certificate issued to her by Bagga Clinic Annexure P-IV in the records of the Labour Court. The concerned Doctor Bagga has certified that the workman Sukhwinder Kaur Kang had been suffering from depression and remained under medical treatment from July 1, 1993 to October 21, 1995 and during this period she was advised to stay with her husband. Now merely because she

needed the company of her husband would not mean that she was unable to attend her duties which were indeed away from her residential home and was unable to communicate her absence to the concerned authorities. The certificate produced is far from satisfactory. Admittedly she has a husband who is also working. Her husband could have informed the Department about her absence.

Mr. Kapil Dev Sood, learned counsel for the workman strenuously urges that the workman did not receive any of the notices issued to her and it is for this reason that she did not reply. The contention appears to be without any foundation. Firstly, this is only a statement of workman in her own favour without any proof and secondly, even otherwise it cannot be said that she was not in a position to communicate to her employer about her absence, as noticed earlier.

To attract Section 25-F of the Act, termination of the services of an employee must be by some act of the employer. If there is no termination of the services by the employer out of his own volition but the dis-engagement or discharge of the employee is caused on account of some act or event over which the employer has no control, then in my view, it cannot be said to be retrenchment of services of a workman within the meaning of Section 2 (oo) of the Act. The essence of retrenchment is the termination of workman's services by some act on the part of the employer. In the instant case, the employer is not expected to wait for two years for workman to return who had also sent notice at her admittedly known address.

This apart, expression 'voluntary retirement' in clause (a) of Section 2 (oo) of the Act, would indisputably include abandonment of job by an employee. In common Law, an inference can be

drawn from the length of absence from duty and surrounding circumstances that the workman relinquished his or her job voluntarily. The contract of service, I hardly need to emphasize, comes to an end when the workman abandons the job. Even though 'abandonment of service' is not defined in the Act yet abandonment would mean to "leave completely and finally". In other words, 'voluntary retirement' would include relinquishment of the work by a workman completely and finally which has to be gathered from the circumstances in each case. The presumption of abandoning the job can validly be raised from long absence without leave or information to the employer.

Mr. K.D. Sood, learned counsel for the workman relying upon *L. Robert D'Souza –v- Executive Engineer, Southern Railway and another, 1982 (1) SCC 645* would contend that termination of service for unauthorized absence from duty would amount to retrenchment. True it is if the termination of service results from unauthorized absence from duty would amount to retrenchment but in this case, the question of workman being on an authorized absence does not arise. There was no communication to the Department about the absence of the workman. It is only after more than two years that the workman comes and say that he was unwell and therefore, did not come to the job.

In *L. Robert D'Souza*, the appellant joined service in Railways as Gangman. He had continued service in Construction Division for more than twenty years. He was transferred to several places. Robert D'Sourza became General Secretary of the Construction workers union. He was transferred from his place of

posting, where he was working as Peon/Lascar though later his transfer was cancelled by the mediation of Trade Union Leader. Lateron D'Souza went on fast unto death for redressal of the grievances espoused by the Union, but on intervention of the Assistant Labour Commissioner, he broke his fast but authorities immediately thereafter terminated his service for his unauthorized absence from duty while he was on fast unto death. It is in this context that Their Lordships held that if an employee remains on unauthorized absence from duty and his services are terminated, it would amount to retrenchment. In this case, there was an act on the part of the employer in terminating the services of D.Souza.

Another case on which Mr. Kapil Dev Sood rely is *D.K. Yadav –v- J.M.A. Industries Ltd., 1993 (4) S.L.R. 126.* In that case, the appellant abstained from duty for eight days and under the Standing Orders, his services were terminated. It is in this context Their Lordships observed that even action under the Standing Order would attract the principles of natural justice.

In the present case, as noticed above, the workman remained absent without any information to the employer or communicating any reasons for her absence and suddenly wanted to join her duties after two years with a certificate that she was advised to live with her husband during this period. In my view, voluntary absence which amount to voluntary abandonment and voluntary retirement from the work would not amount to retrenchment within the meaning of Section 2 (oo) of the Act and therefore, Section 25-F of the Act is not attracted in the facts and circumstances of this case.

Learned Labour Court erred in holding that workman was terminated from her services in violation to Section 25-F of the Act.

In result, the petition is allowed. Impugned award made by the learned Labour Court is set-aside. Reference would stand dismissed.

No costs.

(K C Sood)
Judge.

January 3, 2006.
(BM).